No. 84-1940

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In The

Supreme Court of the United States

October Term, 1984

WILBUR E. DOW, JR.,

Petitioner,

vs.

UNITED VAN LINES and RIMBACK STORAGE COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Whether this Court should resolve conflict created by the Third Circuit's unwarranted expansion of *Howe* which conflicts with the Eighth Circuit's holding in *Fraser-Smith* requiring the carrier to mitigate damages.

2. Whether the Third Circuit and the District Court erred in failing to differentiate between "Homeowner" and "Shipper" in context of the Carmack Amendment.

3. Whether carriers which defraud homeowners and violate all terms of carriage contract can nonetheless invoke the so-called "declared valuation" portion of contract.

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WILBUR E. DOW, JR.

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vs.

UNITED VAN LINES and RIMBACK STORAGE COMPANY

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner, Wilbur E. Dow, Jr. (hereinafter referred to as "Dow"), prays that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit in this proceeding.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit affirming the orders of the District Court granting summary judgment is not reported. It appears in Appendix A to this petition.

The opinions of Chief Judge Fisher of the United States District Court for the District of New Jersey dated January 12, 1983, April 28, 1983, and August 24, 1983, are not reported. They appear in Appendices B, C, and D to this petition.

The opinion of Judge Ackerman of the United States District Court for the District of New Jersey dated March 26, 1984, is not reported. It appears in Appendix E to this petition.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 7, 1985. This petition is filed within 90 days thereof.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The following section of the Interstate Commerce Act, 49 U.S.C. § 20(11) commonly referred to as the "Carmack Amendment" provides in pertinent part:

> "the value declared in writing by the shipper or agreed upon in writing as the released value of the property . . . shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released . . . . ."

STATEMENT OF THE CASE

A. Statement of Facts

In June 1979 a United Van Lines ("United") tractor trailer containing a substantial portion of the household goods, clothing,

antiques, law library and personal effects of the family of Wilbur E. Dow, Jr. pulled up to his recently completed dwelling on the shores of Lake George, New York. The driver of the van seemed reluctant to discharge the property and for good reason: water was leaking from the van. When opened, the contents disgorged therefrom were in tatters; legs were rotted and falling off chairs, desks and tables; leather goods were mildewed beyond recognition; clothing and bedding and pillows weighing many times their weight were stained, disintegrating and rancid and putrid to the smell. In short, the entire contents save but a few articles were soaking wet. An additional substantial portion of Dow's goods never made it onto the van; 18 large moving cartons never turned up at all.

Prior thereto and in August of 1976 Dow entered into negotiations with the local agent for United, namely, Rimback Storage Company ("Rimback"), for the purpose of moving and placing into storage the household goods and furnishings pending the completion of the home under construction at Lake George. Dow had resided in Short Hills for a period of 32 years prior to the contemplated move.

Among other things the discussions with a Mr. Mara of Rimback centered on the amount of insurance coverage provided by I.C.C. regulations. He was told that an automatic amount was provided by the weight of the shipment but Mara stated that, based on his estimate, the insurance coverage would be less than $20,000. Accordingly, Dow determined that he wanted to purchase an additional $30,000 of protection against breakage and rough handling. While Dow admittedly wrote the figure of $30,000 on the form handed him by Mara (for which Dow subsequently was held to be an expert) he in no way intended that figure to be the actual value of his goods entrusted to United and Rimback.

On September 1, 1976, Rimback took possession of Dow's goods. They were transported to Rimback's warehouse in Milburn,

about a mile from Dow's prior residence. A small portion was unloaded and warehoused pursuant to the agreement; 95% was left in the van in the yard where it remained for a period of eight months. Dow was not told that the goods were not placed in the warehouse for safekeeping. Rimback on the contrary, advised Dow that the goods had been warehoused because it invoiced Dow for unloading the goods and commenced billing him for warehouse storage.

In April 1977, someone from Rimback inspected and found the goods to be in a deplorably wet but, as yet salvageable condition. The van, in which the goods had not intended to be stored in any event, had proved to be "unseaworthy" and had sprung a leak, thereby giving rise to the serious water damage condition. Despite the knowledge of this situation, neither Rimback nor United ever notified Dow. No attempt was made to allow him rights of restoring and salvaging his goods. No attempt was made to mitigate or control or correct the damages to the property by Rimback or United. Instead, the goods were simply shoved "as is" into the warehouse vaults where Dow had assumed his goods were being stored all the while.

Thus, in addition to water damage, now mildew and rot set in as the goods were left to further deteriorate for more than two additional years.

Throughout this entire period of time, Rimback and United continued to bill Dow for storage premiums, as if the goods were in mint condition. In pristine ignorance, Dow completed his house in Lake George and in June 1979, requested that the goods be shipped to him by Rimback and United. As stated hereinbefore, Dow first became aware of any damage when the van pulled up to his Lake George homesite.

B. The Proceedings Below

Dow originally brought suit in Superior Court, Law Division, Essex County, New Jersey, against Allstate Insurance Company, United Van Lines and Rimback Storage Company in June 1979. Prior to trial, the case was settled as to Allstate and voluntarily dismissed as to the other defendants.

Thereafter in November 1981, suit was instituted in the United States District Court for the District of New Jersey against United Van Lines and Rimback Storage Company.

A motion for summary judgment was filed by United and the District Court, per Fisher, C.J., granted the same in favor of United. The court held (1) that the Carmack Amendment has preempted suits in negligence by holders of bills of lading against their carriers; (2) that the doctrine of "material deviation" applicable to suits in admiralty, should not apply under the Carmack Amendment notwithstanding the allegation by the petitioner that the contract of carriage was rescinded by the actions of the shippers; and (3) since petitioner received more than $30,000 for his goods by way of settlement with Allstate and had made an "absolute, deliberate, and well-informed" choice to release his goods to the shippers at a value of $30,000, any further recovery was absolutely barred by the Carmack Amendment.

Motions for rehearings filed by Dow were denied by the court in the opinions dated April 28, 1983 and August 24, 1983, respectively.

A motion for summary judgment was filed by Rimback and the District Court, per Ackerman, J. granted the same. It held that the "law of the case" doctrine should apply. It then substantially ratified the findings and holdings made previously by Judge Fisher.

REASONS FOR GRANTING THE WRIT

I.

THE EIGHTH CIRCUIT'S REQUIREMENT THAT THE CARRIER MITIGATE DAMAGES AND EXERCISE REASONABLE CARE IS IN DIRECT CONFLICT WITH THE RULING BELOW IN WHICH THE THIRD CIRCUIT IMPROVIDENTLY EXTENDED THE *HOWE* DECISION ABSOLUTELY LIMITING SHIPPER TO VALUE DECLARED BILL OF LADING.

The leading case in the Third Circuit is *Howe v. Allied Van Lines,* 622 F. 2d 1147 (3rd Circuit), *cert. denied,* 449 U.S. (1980). Given normal circumstances the Federal District Court in New Jersey as well as the Third Circuit Court of Appeals would be bound to apply the precedent set in *Howe* unless, of course, this Court had superseded *Howe* with its own interpretation.

The burden, thus, was to convince the lower courts that a standard other than that enunciated in *Howe* should be applied. It is submitted that that was clearly, manifestly and patently done and that the courts below committed reversible error by not circumscribing *Howe* in light of rulings by the sister Eighth Circuit and by the recodification of the Carmack Amendment.

The Carmack Amendment is merely the codification of certain well established common law principles stemming from the basic recognition that every party to a transaction who has a chance to do so must mitigate whatever damages are incurred by another party thereto. *Fraser-Smith Co. v. Chicago Rock Island & Pacific R. Co.,* 435 F. 2d 1396, 1399 (8 Cir. 1971). It is a common law duty of a carrier to exercise such reasonable care as is required under the circumstances to protect a shipment from injury during transportation. *Inland Waterways Shippers Ass'n, Inc. v.*

Mississippi Val. Barge Line Co., D.C. Mo. 1960, 194 F. Supp. 818, *appeal dismissed,* 289 F. 2d 374, *cert. denied,* 82 S. Ct. 723, 368 U.S. 876, 7 L.Ed. 2d 77.

Additionally, as set forth in *Seaboard Air Line R. Co. v. Lake Region Packing Ass'n.,* 211 So. 2d 25 (Fla. App. 1968), a common carrier is obligated to use reasonable care to transport the goods entrusted to it by the shipper.

The Eighth Circuit also recognizes that:

> "[A] contractual limitation of liability will not restrict the shipper's recovery where the carrier has breached a material or essential provision of the underlying agreement, for such a deviation arguably represents a complete failure of consideration and compels rescission of the entire carriage contract." *Rocky Ford Moving Vans, Inc. v. United States,* 501 F.2d 1369, 1372 (8th Cir. 1974).

Although the courts below were constrained to be sympathetic to Dow's outrage over the handling and treatment of his goods they mechanically implemented what they saw to be the mandate of *Howe.* In doing so they lost sight of the fact that the contract for *shipment* was but a small part of the transaction between Dow and United and Rimback and that the contract for *bailment* or storage was the central part of the agreement.

Although the Uniform Commercial Code permits a warehouseman to limit his liability by a term in the storage agreement which sets forth a specific liability for the articles stored (N.J.S.A. 12A:7-204), there are, nonetheless, basic requirements necessary in order to limit the liability. Fundamental to these is that the bailee exercise due care for the bailed property.

In the case under review, the bailee took possession of the goods on September 1, 1976. Breach of the contract occurred on September 3, 1976 when Dow was sent an invoice charging him for the unloading of the van into the warehouse when in fact, United and Rimback had never unloaded the same but had left it exposed to the elements on the Rimback storage lot.

The courts below were loath to involve what they termed to be the "material deviation" admiralty doctrine. This was, however, no deviation but, in effect, a repudiation of the contract by United and Rimback. It is inconceivable to posit the proposition that Dow would have assented to have his goods "warehoused" out-of-doors in a leaky trailer for a period of eight months between September 1976 and April 1977.

Article 7 of the Uniform Commercial Code provides that a warehouseman has the burden of explaining any loss or disappearance of the bailed property. In *Proctor & Gamble Distributing Co. v. Lawrence American Field Warehousing Corp.*, 16 N.Y. 2d 344, 266 N.Y.S. 2d 785, 213 N.E. 2d 873, 21 A.L.R. 3d 1320 (1965), a trader in vegetable oils persuaded a soybean oil producer to engage in field warehousing so that the trader could more fully utilize its working capital. The producer shipped soybean oil under railroad bills of lading to itself as consignee in New Jersey, where the oil was delivered to a warehouseman for storage and safekeeping. About 9 million pounds of soybean oil, sold to the trader for over $1 million, disappeared without explanation after it had been delivered to the warehouseman.

The court held that the warehouseman had the burden of explaining any loss or disappearance of the property bailed; and that it was not enough for the warehouseman to assert that care was taken when the disappearance of the oil remained wholly unexplained. The court also said that it was self-contradictory for a warehouseman simultaneously to assert due care and total lack of knowledge of what happened; that it would establish an

unwise rule to place a bailee in a better position to be excused if he knew less about the disappearance of the goods than if he knew more; and that this was the underlying reason for the time-honored law of New York and New Jersey, continued and not abolished by the Uniform Commercial Code, requiring a warehouseman to make an explanation of injury or loss in the case of bailed merchandise.

In the case at bar, the respondents were never required to account for the property lost or destroyed. The courts below imposed no duty of mitigation upon United and Rimback but, instead, slavishly adhered to what they perceived to be the guiding principle as expostulated in *Howe*. In doing so the courts committed reversible error.

II.

THE LOWER COURTS WRONGFULLY EQUATED STATUS OF "HOMEOWNER" WITH THAT OF "SHIPPER".

The courts below held Dow to the highest standard possible because he was an admiralty lawyer of many years' standing. In the District Court opinion, Chief Judge Fisher states the following:

> "Considering that Plaintiff is an experienced admiralty lawyer, I must assume that his choice in valuing his goods at that amount was 'absolute, deliberate and well-informed'." (8a-9a).

In Dow's own affidavit, however, he advised the court that he was totally unfamiliar with the household moving industry inasmuch as he had lived in his house for over 32 years.

In the Legislative History concerning the "Household Goods Transportation Act of 1980" (P.L. 96-454), the Committee on

Public Works and Transportation make the following salient observation:

> "The fact that the household moving sector does business directly with individual shippers also sets it apart from the rest of the trucking industry. These shippers usually move only once or twice in their lives and, consequently, lack a thorough understanding of the industry and sufficient clout to negotiate with it. Their situation is made more vulnerable by the fact that the moves involve all of their personal possessions, which often are of a fragile nature. Further, 60 percent of the household goods moves take place between June 1 and October 1. Clearly, this condition poses operational problems which strain the industry's resources.
>
> The household goods moving industry *is the single most frequent subject of consumer complaints to the Interstate Commerce Commission*. During 1979, the Commission received 24,609 consumer complaints, an average of 2.1 complaints per 100 shipmments transported." U.S. Code Cong. & Admin. News, (1980), p. 4272. (Emphasis supplied.)

It further observes that "the Committee recognizes that many users of household goods carriers are ordinary consumers unfamiliar with how the industry works and without the economic leverage of commercial shippers. These persons tend to be more vulnerable than other shippers and, hence, in need of protections that are not necessary for other motor carrier shippers. (*Ibid.* p. 4275.)

Dow was not a shipper. Dow had not engaged in a household move for more than 30 years. While Dow was and is an admiralty lawyer he had no more experience or knowledge of ICC regulations or the Carmack Amendment than an average householder. For the court below to hold Dow to a higher standard of knowledge or expertise was error.

The Committee on Public Works and Transportion published some interesting statistics with relation to the moving industry. It noted that the ten largest carriers accounted for about 75% of the total revenues of the industry, although there were about some 2,650 individual carriers that made up the industry. It further noted that one of the unique features of the industry "is its heavy dependence on agents. The use of agents developed in response to the ample backhaul problem faced by the carrier. . . ." Today, some carriers depend on the agents to provide the resources used in their transportion operations. The agents book the shipments; arrange for them to be weighed; provide packing, unpacking, and storage services; and often transport the shipments. Today there are approximately 6,500 household moving agents. Three of the ten largest — Allied-Van Lines, Atlas Van Lines, and United Van Lines — are owned and controlled by agents. All of the directors of United Van Lines are agents. These three carriers share 50 percent of the market of the ten largest carriers." (*Ibid.* p. 4271-2.)

Based upon the foregoing evidence from which they could clearly differentiate Dow from a shipper in the normal course, the lower courts turned their attention to whether they were bound by the precedent established by *Howe.*

At this juncture, it is imperative to subject *Howe* to more careful scrutiny. First of all, *Howe* is not a "first party" suit. The nominal plaintiff in the cause of action was a soldier named Howe, a member of the U. S. armed forces, but the real party in interest was the casualty insurer which insured Howe against damage and which was now asserting a right of subrogation.

At the very outset, therefore, *Howe* is clearly distinguished from that of the case at hand. The plaintiff in *Howe v. Allied Van Lines, Inc.* is not in fact the army officer who had his goods destroyed but the insurance company which had paid him for the loss in which was seeking to recover over against the real party at fault. As a secondary matter, it is clear from the language of the opinion that the court acknowledged the fact that the armed services is recognized as a substantial mover of goods and services. The opinion states as follows:

> "The government's shipment of household goods is a massive operation and is part of a comprehensive compensation plan for the military. The government has elected to act as a self-issurer for the excess of value over 60 cents per pound, upon the reasonable belief that by doing so, it will obtain mere favorable rate quotations from the common carriers of household goods."

The lower courts, in relying on *Howe* as precedent for denying a remedy to Dow, erroneously concluded that Dow and the United States are on the same footing when it comes to bargaining power. Further, they ignored the fact that Dow is suing first party and that Howe was suing as subrogee after having been made whole for his loss and that the real party in interest was the insurer seeking to recoup its payment to Howe. Having made two erroneous assumptions upon which to base its conclusion, they deemed that they could accordingly ignore any further arguments by Dow that the conduct by United and Rimback was of such an egregious kind and quality so as to prohibit them from seeking the protection of the Carmack Amendment with respect to which, the Committee on Public Works and Transportation noted:

> "Currently, the Interstate Commerce Commission exerts very little direct control over agents. Even in a situation where an agent is dishonest or

> consistently provides poor service to shippers, the Commission seldom becomes involved. Instead, it relies primarily on the carriers to discipline these agents. However, this arrangement has not always been effective. The Commission has reported several reasons for this situation. Some carriers seem unwilling to direct or control the operations of their agents, because they depend on the agents for the performance of the transportation services. Also, several of the major carriers are owned and controlled by their agents. Further, in some instances where principal carriers have reprimanded agents or terminated agency agreements, those agents simply have moved to other carriers." (Op. Cit., p. 4278.)

It is submitted that the factual allegations involved herein, namely, the willful, material and fraudulent breach of the terms and conditions of the contract by the agent should prevent both agent and principal from hiding behind the supposed literal terms of its Carmack invoice.

The plain truth of the matter is that Dow was at an obvious disadvantage in dealing with what he assumed to be honest parties who intended to uphold their end of the bargain. He felt he was purchasing additional protection to insure against fortuitious losses (*i.e.*, a risk commensurate with the value of the goods under normal conditions, circumstances and eventualities) . Instead, he was dealing with crooks who stole his money and who later, in effect, stole his property.

Courts need not slavishly invoke prior precedent when the facts and circumstances no longer warrant doing so. *Howe* was a separate and distinct situation far removed from that of Dow. The government contracts for tens of thousands of moves each

year; Dow contracted for one shipment in thirty years. The courts below erred in attributing a special onus of expertise to Dow.

III.

CARRIERS GUILTY OF FRAUD AND ABROGATION OF CONTRACT ARE ESTOPPED FROM LIMITING LIABILITY FOR DAMAGES TO SHIPPER OF HOUSEHOLD GOODS.

As pointed out hereinbefore, United and Rimback paint Dow as a knowledgeable, astute, brilliant admiralty lawyer, much experienced in water transportation law and cases; that he knew and understood fully the terms of the bill of lading and that, accordingly, the $30,000 figure contained in the I.C.C., declaration is an absolute, finite and final bar to any recovery above and beyond it. The insinuation was that he was too cheap to declare full value of his furniture so let him suffer the consequences. He gambled and he lost.

Most contracts, but assuredly insurance contracts, are not "gambling" contracts. An insurance company agrees to protect against certain risks and that is against what it insures. In this case the insurance company (Allstate, for it is still the insurer of Rimback, if not United) represented and contracted with both parties. It insured Rimback for liability, for its negligent acts, but simultaneously provided insurance to Dow for damage to his goods while being packed, shipped, stored and finally delivered. When Rimback took possession of Dow's goods in September 1976, and left them out-of-doors while nonetheless advising Dow that they had been warehoused, a material *deviation* occurred. Thereafter, Rimback, as agent for United stole monthly storage premiums and continued to steal from Dow for the balance of the period that the goods were in their possession.

In April 1977, a *repudiation* of the contract occurred. Rimback, already in violation of the contract, discovered that the goods inside the van were soaking wet. It and United had a duty to notify Dow of the condition of his property. By concealing the condition, they illegally converted Dow's property to themselves and in doing so, repudiated *in toto* the contract between the parties. By virtue of such repudiation, coupled with their deliberate and willful determination to prevent Dow from attempting to make his own salvage and mitigation of loss to his own goods, they should be liable for any amount of damages that arose thereby. For the courts below to countenance such egregious and outrageous conduct by the parties and to permit them to act with impunity amounts to a total denial of justice. It is respectfully hoped that such conduct will not be sanctioned.

CONCLUSION

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ARTHUR P. CONDON
Attorney for Petitioner

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 84-5332

WILBUR E. DOW, JR.,

Appellant

v.

UNITED VAN LINES and RIMBACK STORAGE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

(D.C. Civil No. 81-3411)

District Judge: Honorable Clarkson S. Fisher

Argued February 26, 1985

Before: ADAMS, WEIS and WISDOM*, *Circuit Judges.*

Filed Mar. 7, 1985

MEMORANDUM OPINION OF THE COURT

WEIS, *Circuit Judge.*

Plaintiff was the owner of household goods which he entrusted to the defendants for transit and storage. At the time

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* Honorable John M. Wisdom, United States Circuit Judge for the Fifth Circuit, sitting by designation.

he placed the order for shipment, plaintiff, in writing, "released" the goods to the carrier "to a value not exceeding $30,000."

The district court entered summary judgment for the defendants in two separate orders. In each the court ruled that the plaintiff's entitlement was limited to $30,000 because of the valuation he had placed on his property.

It is undisputed that plaintiff had received $34,000 in settlement of an earlier lawsuit against defendants in state court. That sum had been paid by the Allstate Insurance Company which insured one or both of the defendants. Because plaintiff had received the full amount of the valuation he had placed on his property, the district court concluded he was precluded from any further recovery.

The defendants' allegedly careless and callous conduct in failing to properly store the plaintiff's property understandably would create the feelings of outrage he now expresses. Nevertheless, the degree of negligence, if any, is irrelevant. The issue is whether plaintiff is bound by his declared valuation of the household goods.

We conclude that this case is governed by the Carmack Amendment, 49 U.S.C. § 20(11), *recodified at* 49 U.S.C. § 11707 (1982). That statutory provision limits the carrier's liability to the declared valuation. *See* 49 U.S.C. § 10730 (1982). In *Howe v. Allied Van Lines, Inc.*, 622 F.2d 1147 (3d Cir.), *cert. denied*, 449 U.S. 992 (1980), this court said that "Congress in the Carmack Amendment in 1906 federalized and thus made uniform, law of common carrier liability in interstate commerce transactions . . . . [a carrier] could contract for a rate reflecting a declared value of the goods shipped" provided an appropriate tariff were filed. Those conditions have been fulfilled here.

Appendix A

Although in some aspects *Howe* differs from the case at hand, the portion to which we have referred makes it clear that the district court properly ruled in favor of defendants here. Accordingly, the judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

s/ Weis
Circuit Judge

APPENDIX B — OPINION AND ORDER OF UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
NEWARK, N. J. 07101

OPINION

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Re: Wilbur E. Dow, Jr. v. United Van Lines and
Rimback Storage Company
Civil Action No. 81-3411

Gentlemen:

This matter is before the Court on defendant's, United Van Lines, motion for summary judgment pursuant to Fed.R.Civ.P. 56(c).[1]

---

1. Although the defendant refers to the instant motion as a motion to dismiss, in substance it is a motion for summary judgment and will be treated accordingly. See Fed.R.Civ.P. 12(b).

Appendix B

This case involves both breach of contract and tort claims by plaintiff Dow, an individual, against defendants Rimback Storage Company (hereinafter "Rimback") and United Van Lines (hereinafter "United") for damage to plaintiff's household furnishings. These furnishings were transported by a trailer to Rimback's Warehouse for storage pending completion of construction of plaintiff's home in Lake George, New York. The trailer containing the furnishings was left unattended outside the warehouse for over eight months. During that time the furnishings allegedly were damaged by water. Soon thereafter the furnishings were moved inside Rimback's warehouse. Two years later plaintiff's home was completed and his possessions were moved from the warehouse to Lake George whereupon plaintiff discovered the damage.

Plaintiff commenced a suit in the Superior Court of New Jersey, Law Division, Essex County, which was dismissed voluntarily against Rimback and United, following a settlement by plaintiff with a co-defendant, Allstate Insurance Company, Rimback's insurer. The amount of the settlement was in excess of thirty thousand ($30,000) dollars. Plaintiff instituted suit in this Court on November 4, 1981 against Rimback and United.

By way of this motion for summary judgment, defendant United asserts that as a matter of law, it is not liable for damage to plaintiff's household furnishings for the following reasons:

> (1) No principal-agency relationship existed between United and Rimback therefore United is not liable for the acts or omissions of Rimback;
>
> (2) Even if a principal-agency relationship existed between the defendants, the storage period

terminated it, thus only Rimback is liable to plaintiff;

(3) Since plaintiff assessed and received the declared value of his goods in a related state court action against Allstate Insurance Company, plaintiff has already received full satisfaction of his claim.

Fed.R.Civ.P. 56(c) authorizes summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." In this case no genuine issue of fact exists, thus summary judgment is appropriate.

Defendant does not seriously dispute that a principal-agency relationship exists between itself and its co-defendant Rimback. Rather United asserts that such a relationship exists between itself and Rimback only when Rimback is engaged in interstate commerce. United offers no proof of this assertion. Even assuming that United is only liable if Rimback is engaged in interstate commerce, that will not relieve United of principal liability unless it can show beyond dispute, that Rimback was not so engaged. No papers with respect to this motion have conclusively demonstrated that Rimback was not engaged in interstate commerce in this matter. Accordingly, I find that United and Rimback were involved in a principal-agency relationship.

As a common carrier in interstate commerce, United's behavior is governed by regulations issued by the Interstate Commerce Commission ("ICC").[2] Therefore United asserts,

---

2. All parties admittedly were aware that after storage for an undetermined amount of time, plaintiff wanted to ship his furnishings from New Jersey to

(Cont'd)

pursuant to Tariff No. 165-A, MF-I.C.C. No. 182, that its liability as a carrier-principal terminated, once 180 days had passed from the date the furnishings were removed from plaintiff's home. According to the tariff the 180 day period is the maximum period of time for storage-in-transit; once that time period has run, the carrier's liability is terminated and the warehouseman becomes solely liable for damages to the goods. It is unnecessary to address this argument. For reasons which will be set forth in detail below, I find that United is not liable because plaintiff has received the total amount of compensation he is entitled to under controlling federal law by virtue of the prior settlement of the state court action.

The Interstate Commerce Act, 49 U.S.C. § 20(11) (West 1970) (hereinafter the "Carmack Amendment") provides in pertinent part:

> the value declared in writing by the shipper or agreed upon in writing as the released value of the property...shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released... .[3]

(Cont'd)
his new home in New York. Accordingly, this Court characterizes the transportation and storage of the furnishings as interstate in nature; *a fortiori,* the Interstate Commerce Act applies.

3. Congress recently repealed 49 U.S.C. § 20(11) and recodified it without substantive change. 49 U.C.C. § 11707 (1978). However, since the claim arose prior to the recodification and because both parties brief and argue the prior law, I will also use the earlier section for convenience in discussion. *Howe v. Allied Van Lines, Inc.,* 622 F.2d 1147, 1149 (3d Cir.), *cert. denied,* 449 U.S. 992 (1980).

Appendix B

Under this Amendment a carrier may legitimately limit its liability for actual loss or damage to goods received for interstate shipment, but only when it does so in compliance with an Interstate Commerce Commission order authorizing it "to establish and maintain rates that are dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property." *Marohn v. Burnham Van Services, Inc.*, 478 F.Supp. 49, 50 (N.D. Ill. 1979) (and cases cited therein). Defendant United is authorized by the I.C.C. to carry property at tariff rates dependent upon the declared or released value of the shipment. Plaintiff does not dispute that United maintained tariff rates approved by the I.C.C.

There are two ways a common carrier may limit its liability. First, pursuant to Rule 3 of the Interstate Commerce Commission Tariff No. 165-A, MF-I.C.C. No. 182, a carrier will ordinarily be held liable for loss or destruction of goods in an amount equal to $1.25 times the actual weight of the shipment in pounds. Under this same tariff a shipper is given the option to increase the carrier's liability by valuing his property at any amount, the so-called "declared value" and paying a minimal insurance premium to attain the increased coverage. Where a shipper has elected to release his goods at a declared value, his recovery will be limited to that amount. *Strickland Transportation Company v. United States,* 334 F.2d 172, 175 (5th Cir. 1964); *Marohn v. Burnham Van Services, Inc.,* 478 F.Supp. 48, 52 (N.D.Ill. 1979).

In this case plaintiff *chose* to value his goods at thirty thousand dollars. This is plainly written on the bill of lading which the shipper (as required) signed. *Defendant's Exhibits,* 4 and 5. Plaintiff does not dispute that he valued his goods at thirty thousand dollars and signed the bill of lading to that effect. Considering that plaintiff is an experienced admiralty lawyer, I

must assume that his choice in valuing his goods at that amount was "absolute, deliberate and well-informed." *Anton v. Greyhound Van Lines, Inc.*, 591 F.2d 103, 108 (1st Cir. 1978). Therefore unless he can offer some valid reason why the Carmack Amendment's limitation on liability should not apply, plaintiff is precluded from bringing this action against United, because he has already received the declared value of his goods ($30,000) in the prior settlement with Allstate.

Plaintiff asserts, notwithstanding the Carmack Amendment, that a common-law negligence action lies against United. Plaintiff cites *Litvak Meat Company v. Baker*, 446 F.2d 329 (10th Cir. 1971) as support. Unquestionably, the Tenth Circuit in *Litvak* held that the Carmack Amendment did not preempt every common law cause of action brought by a shipper against a carrier for damage to its interstate shipment.[4] *Id.* at 335.

Contrary to *Litvak* the majority of courts have decided that the Carmack Amendment has pre-empted suits in specific negligence by holders of bills of lading against their carriers. *Fulton v. Chicago, Rock Island & Pacific Railroad Co.*, 481 F.2d 326, 331 (8th Cir.), *cert. denied sub. nom., Soo Line Railroad Co. v. Fulton*, 441 U.S. 1040 (1973); *W.D. Lawson & Co. v. Penn Central Co.*, 456 F.2d 419, 423 (6th Cir. 1972); *American Synthetic Rubber Corp. v. Louisville & N.R.R.Co.*, 422 F.2d 462, 466 (6th Cir. 1970); *George R. Hall, Inc. v. Superior Trucking Co., Inc.*, 514 F.Supp. 581, 584 (N.D.Ga. 1981); *Sweeney v. Morgan Drive Away, Inc.*, 394 F.Supp. 1216, 1218 (D.Colo. 1975); *Sylgab Steel & Wire Corp. v. Strickland Transportation Co.*, 270 F.Supp. 264 (E.D.N.Y. 1967).

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4. The Tenth Circuit did say that the "existence of a contractual remedy at common law does not prevent the shipper from bringing an action based *solely* on negligence." *Id.* at 337 (emphasis added). I note that in this case, plaintiff has alleged both breach of contract and tort claims.

Appendix B

The Third Circuit has not ruled on this issue of whether the Carmack Amendment completely preempts common law actions. However, in *Howe v. Allied Van Lines,* 622 F.2d 1147 (3d Cir.), *cert. denied,* 449 U.S. 992 (1980), Judge Gibbons discussed at length the history of the Carmack Amendment, section 20(11). He discussed three aspects of section 20(11), two of which are pertinent here. First, he acknowledged that Congress in the Carmack Amendment in 1966 "federalized, and thus made uniform, the law of common carrier liability in interstate commerce transactions." *Id.* at 1157. Next he noted that Congress adopted the view that "a carrier could not contract out of negligence absolutey, but it could contract for a rate reflecting a declared value of the goods shipped." *Id.*

Considering the interpretation of the Carmack Amendment by the majority of courts and the view of the Third Circuit in *Howe,* I am persuaded that the better view is that the Carmack Amendment has completely preempted suits in negligence by holders of bills of lading against their carriers. Accordingly, plaintiff's complaint, which alleges both breach of contract and tort claims, will be read as asserting a single cause of action under the Carmack Amendment.[5]

Plaintiff next attempts to circumvent the Carmack Amendment's limitation of liability by invoking the "material deviation" doctrine applicable in admiralty suits.[6] That doctrine

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5. Indeed many courts have acknowledged that a cause of action under the Carmack Amendment sounds in negligence. *E.g., Fulton v. Chicago, Rock Island & Pacific Railroad Co.,* 481 F.2d at 333.

6. Though plaintiff doesn't characterize his argument as such, it is clear that this doctrine essentially embodies his argument.

Appendix B

Plaintiff next attempts to circumvent the Carmack Amendment's limitation of liability by invoking the "material deviation" doctrine applicable in admiralty suits.[6] That doctrine provides that "a contractual limitation of liability will not restrict the shipper's recovery where the carrier has breached a material or essential provision of the underlying agreement, for such a deviation arguably represents a complete failure of consideration and compels rescission of the entire carriage contract." *Rocky Ford Moving Vans, Inc. v. United States,* 501 F.2d 1369, 1372 (8th Cir. 1974). In essence this is what plaintiff argues, that since he never bargained to have his furnishings stored outside the warehouse in a leaky trailer, the Court should consider the contract of carriage rescinded.

Most courts are in agreement that this admiralty law concept is inapplicable "in the context of regulated interstate commerce, which is governed by the overriding federal policy of uniformity." *Rocky Ford Moving Vans, Inc. v. United States,* 501 F.2d at 1372; *see, Conoco, Inc. v. Andrews Van Lines, Inc.,* 526 F.Supp. 720, 722 (W.D.Okla. 1981); *Minneapolis Society of Fine Arts v. Railway Express Agency, Inc.,* 213 F.Supp. 129, 132 (D.Minn. 1963).

The Carmack Amendment itself is silent with respect to "material deviations." However I find persuasive the Eighth Circuit's reasoning that the material deviation doctrine has no applicability to a suit under § 20(11). Therefore, I determine as a matter of law that the deviation doctrine advanced by plaintiff to circumvent the Carmack Amendment's limitation of liability, is inapplicable to this case.

As an additional way of circumventing the otherwise valid limitation of liability, plaintiff raises allegations of fraud in his

complaint and requests punitive damages from both defendants. In a review of the relevant case law, the Court has not found one case where punitive damages were awarded when the plaintiff elected to release his goods at a declared value. Two recent cases decided under the Carmack Amendment, in which punitive damages were allowed did not involve facts as in the present case where the plaintiff elected to release his goods at a declared value. *Reed v. Aaacon Auto Transport, Inc.*, 637 F.2d 1302, 1306-07 (10th Cir. 1981); *Hubbard v. Allied Van Lines, Inc.*, 540 F.2d 1224, 1228 (4th Cir. 1976). Indeed the Fourth Circuit in *Hubbard* acknowledged that the only time a carrier may properly limit its liability, including its liability for punitive damages, under the Carmack Amendment, is when the I.C.C. has approved rates based on declared value. *Id.* That is precisely the case here.

In certain circumstances courts have set aside the shipper's declared value limitation and allowed full recovery. However, this is not a case where the carrier has purposely converted the entrusted property for its own use or gain, in which case public policy would not allow a carrier to limit its liability and thus profit from its own misconduct. *See, e.g., Brookfield v. Howard Van Lines,* 213 F.2d 723, 727 (9th Cir. 1954).

Even wilful misconduct of the carrier's employees, in the absence of fraud, does not vitiate the value declaration. *Mitchell v. Union Pacific R.R. Co.*, 188 F.Supp. 860, 874 (S.D.Cal. 1960). In this case, however, plaintiff does allege fraud. From an examination of the Amended Complaint and the Pretrail Order, ¶ 6, it is clear that plaintiff's allegations of fraud relate solely to defendants' acts in billing plaintiff for services he never received, i.e., storage inside a warehouse and a separate insurance policy.[7]

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7. This is not the same insurance policy which forms the basis of plaintiff's prior settlement with Allstate.

Appendix B

Cases allowing fraud to invalidate the value declaration have involved either fraud in the *factum* [*Chandler v. Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967), plaintiff allegedly believed he was signing an inventory when in fact he was signing the value limitation relied upon by the defendant] or fraud in the inducement to enter into the contract of carriage [*Paine Henderson v. Eastern Greyhound Lines, Inc.*, 320 F.Supp. 1138 (S.D.Cal. 1970); *Mitchell,* 188 F.Supp. at 874].

The alleged fraud in this case occurred *after* the contract of carriage was entered into. Thus it can neither be characterized as fraud in the *factum* nor fraud in the inducement. Given that heretofore courts have not allowed the type of fraud complained of here to vitiate the value declaration, I find that plaintiff's allegations of fraud, even assuming their truth, will not serve to set aside the declared value limitation.

It is undisputed that plaintiff has already received more than thirty thousand dollars from Allstate Insurance Company, Rimback's insurer, in the prior settlement of the state court action. That is, plaintiff has already recovered the declared value of his goods. Under the Carmack Amendment, plaintiff's entire measure of damages is equivalent to the declared value. Since the plaintiff has already recovered more than the declared value from the agent's (Rimback) insurer, Allstate Insurance Company, United as principal has no further liability to plaintiff. Accordingly, United's motion for summary judgment is granted. Attorney for United shall submit an appropriate order within five (5) days.

Very truly yours,

CSF:jaa

s/Clarkson S. Fisher
Clarkson S. Fisher
Chief Judge

Original Filed
Jan. 12, 1983

APPENDIX C — OPINION AND ORDER OF UNITED STATES DISTRICT COURT

CIVIL ACTION NO. 81-3411

Original Filed Apr. 28, 1983
Allyn Z. Lite, Clerk

WILBUR E. DOW,

Plaintiff,

UNITED VAN LINES and RIMBACK STORAGE COMPANY

Defendants.

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F I S H E R, *Chief Judge.*

Appendix C

OPINION

This matter is before the Court on motion of plaintiff, Wilbur E. Dow, for re-argument and reconsideration, pursuant to Local Rule 12-I of the Rules of the United States District Court for the District of New Jersey. Oral argument was heard on March 28, 1983.

On January 25, 1983, this Court entered an order granting United Van Lines' ("United") motion for summary judgment. It is this order that plaintiff would have the Court reconsider.

A motion for reconsideration of an order for summary judgment may be construed as a motion to alter or amend the judgment pursuant to Fed.R.Civ.P. 59(e). *DeLong Corp. v. Raymond Intern., Inc.*, 622 F.2d 1135, 1138 n.2, (3d Cir. 1980); *Sonnenblick Goldman Corp. v. Norwalk*, 420 F.2d 858, 859 (3d Cir. 1970). Pursuant to Local Rule 12-I, the moving party must set forth any matters or controlling decisions which they believe the court has overlooked. In this case, plaintiff has cited no controlling decisions which it believes the Court has not considered. Rather, plaintiff asserts that there are factual matters which were overlooked and which now mandate a reconsideration and reversal of the order granting summary judgment.

The only new factual matter brought to the Court's attention is the explanation of insurance coverage. That is, for the first 180 days of transportation/storage, United, as a self-insurer, was liable to plaintiff, for up to $30,000, the amount plaintiff declared as the value of his goods, in the Bill of Lading. After that, Allstate Insurance Company ("Allstate") provided the same coverage as insurer for defendant Rimback, once 180 days had elapsed or the goods were warehoused.

Appendix C

Plaintiff now appears to argue that even though Allstate settled with plaintiff in a related state court action, for an amount in excess of the policy limit, that nonetheless, plaintiff is still entitled to recover on the separate and distinct policy of insurance it had with United. Defendant asserts that, in reality, there was one continuing policy for $30,000. During the first 180 days, United was the insurer, after that, the identical coverage was continued in effect for Rimback, by Allstate.

Unquestionably, under the Interstate Commerce Act, 49 U.S.C. § 20(11) (West 1970) ("Carmack Amendment"), the plaintiff was entitled to receive the declared value of his goods, $30,000. The question is whether he can recover more, by virtue of how the insurance coverage worked in this particular case. Plaintiff's assertion that he can recover under this separate and distinct policy with United is unfounded. There was in existence one policy insuring his goods for their declared value for $30,000. That different parties were liable for this amount at different times is immaterial. All plaintiff is entitled to is $30,000. If his goods were totally destroyed, he still could not collect more than $30,000.

Accordingly, I decline to reconsider the order dated January 24, 1983, granting summary judgment in favor of defendant, United. Plaintiff's motion for reconsideration is denied. See annexed order.

Appendix C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 81-3411

WILBUR E. DOW

Plaintiff,

v.

UNITED VAN LINES and RIMBACK STORAGE COMPANY,

Defendants.

O R D E R

This matter having been brought before the Court on motion of plaintiff and for the reasons set forth in the opinion of this court filed on even date;

It is on this 28th day of April, 1983;

O R D E R E D that said motion be and the same is hereby denied and that the order of this Court dated January 24, 1983 granting summary judgment in favor of defendant United Van Lines stands.

s/ Clarkson S. Fisher
CLARKSON S. FISHER
CHIEF JUDGE

APPENDIX D — OPINION AND ORDER OF UNITED STATES DISTRICT COURT

CIVIL ACTION NO. 81-3411

Original Filed Aug. 24, 1983
Allyn Z. Lite, Clerk

WILBUR E. DOW, JR.,

Plaintiff,

UNITED VAN LINES and RIMBACK STORAGE COMPANY

Defendants.

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Appendix D

FISHER, *Chief Judge.*

This matter is before me on plaintiff's motion for reconsideration of an order granting summary judgment in favor of defendant United Van Lines ("United"). The defendant has made a cross-motion to recover its costs, including attorney's fees, incurred in this litigation. have considered these motions without the benefit of oral argument pursuant to Fed.R.Civ.P. 78.

At the outset, I note that plaintiff has not complied with Local Rule 12-I with respect to the time limit on filing for reconsideration. That rule provides, "A motion for re-argument shall be served and filed within 14 days after the filing of the court's order or judgment on the original motion. . . ." The original order granting summary judgment in favor of United was filed January 24, 1983. Plaintiff's papers in support of this reconsideration motion were filed July 6, 1983. Although plaintiff's request is obviously untimely, and therefore could be denied on that basis alone, a review of the prior proceedings in this matter will serve to demonstrate why I must deny reconsideration other grounds.

I heard oral argument on United's motion for summary judgment in October, 1982. On January 12, 1983, I issued a seven-page opinion detailing my reasons for granting summary judgment. *See Wilbur E. Dow, Jr. v. United Van Lines and Rimback Storage Co.*, No. 81-3911 (D.N.J. Jan. 12, 1983). The order accompanying this opinion was filed January 24, 1983. On February 14, 1983, plaintiff moved for re-argument and reconsideration pursuant to Local rule 12-I. Using the discretion given me by that local rule, I heard oral reargument on March 28, 1983. After reading the papers and listening to counsels' arguments, I concluded that my original order granting summary judgment in United's favor

should stand. On April 28, 1983, I issued an opinion and order to that effect. *See Wilbur E. Dow, Jr. v. United Van Lines and Rimback Storage Co.,* No. 81-3411 (D.N.J. April 28, 1983). On July 6, 1983, plaintiff filed this present motion for reconsideration. I denied plaintiff's request for oral argument and the matter is before me now on the papers pursuant to Fed.R.Civ.P. 78.

On this current motion for reconsideration, plaintiff asserts that in my original opinion granting summary judgment and the subsequent reconsideration opinion affirming that, I erroneously limited my inquiry to the contractual relationship between Dow and United and concluded that Dow had already received the amount he was entitled to under the contract of carriage. Dow maintains that United is liable to him not only in contract, but also in tort, thus, although Dow has already obtained his remedy under the contract he still has a cause of action against United on a tort theory.

Not only is plaintiff's current motion for reconsideration untimely, but he has offered no explanation why he did not "consolidate" this reconsideration request with the prior one, which was filed timely. Notwithstanding that, it is clear that substantively, plaintiff's current assertion is without merit. His contention is essentially, that I erred by treating his claim against United as sounding solely in contract and not in tort. In my original opinion filed January 12, 1983, I considered this issue thoroughly, and after careful consideration concluded that:

> Considering the interpretation of the Carmack Amendment by the majority of courts and the view of the Third Circuit in *Howe*, I am persuaded that the better view is that the Carmack Amendment has completely preempted suits in negligence by

holders of bills of lading against their carriers. Accordingly, plaintiff's complaint, which alleges both breach of contract and tort claims, will be read as asserting a single cause of action under the Carmack Amendment.[5]

---

5. Indeed many courts have acknowledged that a cause of action under the Carmack Amendment sounds in negligence. *E.g., Fulton v. Chicago, Rock Island & Pacific Railroad Co.*, 481 F.2d at 333. *Wilbur E. Dow, Jr. v. United Van Lines and Rimback Storage Company*, No. 81-3411 (D.N.J. Jan. 12, 1983).

Plaintiff's claim that I did not consider this tort/contract distinction is simply untrue. Moreover, plaintiff has not cited me to one case which would persuade me to change my legal reasoning as stated above, with respect to the tort/contract distinction. Clearly, plaintiff's relitigation of this issue before me is inappropriate; his appropriate remedy is appeal.

Accordingly, I deny plaintiff's motion to vacate the prior order granting summary judgment in favor of United.

United has cross-moved for costs, including attorney's fees, in this matter. In deciding whether to award attorneys' fees, federal courts will follow state law when the basis for jurisdiction is diversity. *Alyeska Pipeline Service Co. v. Wilderness Soc.*, 421 U.S. 240 (1975); *Time Mechanisms, Inc. v. Qonaar Corp.*, 412 F.Supp. 905 (D.N.J. 1976). Rule 4:42-9(a) of the New Jersey Civil Practice Rules provides that, "no fee for legal services shall be allowed in the taxed costs or otherwise," except in certain limited circumstances enumerated therein. This rule reflects the policy

of New Jersey courts that "except in the situations within its terms each litigant shall beat the expenses of prosecuting and defending his individual interests." *Sunset Beach Amusement Corp. v. Belk,* 33 N.J. 152, 167 (1960). No provision of that rule allows me to award attorneys' fees in the instant case.

Defendant has also applied for costs. Costs are allowed as a matter of course to the prevailing party in federal courts, unless the court directs otherwise. Fed.R.Civ.P. 54(d). It appears therefore, that United should be entitled to recover costs incurred in defending this action. For the following reasons however, I must direct that no costs be taxed. Local Rule 23 of the Rules of the United States District Court for the District of New Jersey provides:

> 23A. Within thirty days after the entry of a judgment allowing costs, the prevailing party shall serve on the attorney for the adverse party and file with the Clerk, his Bill of Costs and Disbursements, together with a notice of motion when application will be made to the Clerk to tax the same. . . .
>
> 23D. Upon failure to comply with this rule, all costs shall be waived.

On January 25, 1983, a form letter was sent to counsel for United, informing him that a judgment against the plaintiff was entered *with costs* on January 24, 1983. A copy of this letter is attached to the Clerk's file and it is docketed. The letter explained the procedure to follow if defendant wished to have costs taxed. The last sentence in the letter states: "The original notice to tax and bill the costs should be filed in this office within thirty days after

the entry of judgment or the costs shall be deemed waived. Defendant did not file a motion for costs until June 24, 1983. Any argument that United did not file earlier because of plaintiff's reconsideration motions is specious. The Court certainly could have taken that factor into consideration in its decision whether to award costs. Defendant was obligated under Local Rule 23 to file a motion for costs within 30 days of January 24, 1983. Failure to do so amounts to a waiver thereof.

Accordingly, I must deny United's motion for costs. See attached order.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CIVIL ACTION NO. 81-3411

WILBUR E. DOW, JR.,

Plaintiff,

v.

UNITED VAN LINES and RIMBACK STORAGE COMPANY

Defendants.

This matter having been brought before the Court on motion of plaintiff for reconsideration of this Court's order filed January 24, 1983, and on cross-motion of defendant United Van Lines, for costs, and this matter being considered without the benefit of oral argument pursuant to Fed.R.Civ.P. 78 and Local Rule 12-I, and for the reasons set forth in the opinion of this Court filed on even date;

It is on this 24th day of August, 1983;

O R D E R E D that said motion for reconsideration be and the same is hereby denied and that the order of this Court dated January 24, 1983 granting summary judgment in favor of defendant United Van Lines stands; and it is further

O R D E R E D that defendant's cross-motion for costs is denied.

s/ Clarkson S. Fisher
CLARKSON S. FISHER

CHIEF JUDGE

APPENDIX E — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT

CIVIL 81-3441

WILBUR E. DOW, JR.,

Plaintiff,

-vs-

RIMBACK STORAGE CO.,

Defendant.

TRANSCRIPT OF PROCEEDINGS

OPINION

Newark, New Jersey
March 26, 1984

B E F O R E:

HON. HAROLD A. ACKERMAN, U.S.D.J.

A p p e a r a n c e s:

ARTHUR P. CONDON, ESQ.
For Plaintiff

THOMAS F.X. FOLEY, ESQ.
For Rimback Storage Co.

Appendix E

THE COURT: Well, this is a case, as Counsel know, I believe I conferenced this case, I tried to get the parties to settle their differences, to no avail, some months ago, so I was familiar with it before the Motion ever hit the court.

This case, as the parties know, involves allegations of negligence and breach of contract by the defendants in the process of transporting and storing plaintiff's household goods in preparation for his move from Short Hills, New Jersey to Lake George, New York.

Defendants were United Van Lines (United) and Rimback Storage Company (Rimback).

On the 12th of January, 1983, by a letter opinion, Chief Judge Fisher granted Summary Judgment in favor of United based on the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. Section 20.11, and upon the fact that pursuant to a settlement of a prior related State Court action, plaintiff had already received payment by Rimback's insurer, Allstate Insurance Company, in excess of the declared value of his household goods as this figure appeared on the bill of lading in question.

The Court's Order granting Summary Judgment in favor of United was filed on the 24th day of January, 1983. The Court was twice requested to reconsider its Order of January 24th. By Orders dated April 28th and August 24, 1983, Chief Judge Fisher denied plaintiff's Motions to reargue and reconsider its holding.

By Notice of Appeal filed September 26, 1983, plaintiff attempted to appeal the Court's grant of Summary Judgment to United to the Third Circuit. This appeal was dismissed by the Court of Appeals without prejudice on December 2, 1983, because

it was not filed within the time prescribed by Rule 4(a)(1) of the Federal Rules of Appellate Procedure. The matter is presently before me on Defendant Rimback's Motion to dismiss plaintiff's claims against it. For the reasons set forth in this Opinion, I have decided to treat defendant's Motion to dismiss as one for Summary Judgment as provided in Rule 12(b) of the Federal Rules of Civil Procedure in that disposition of the Motion requires that I look beyond the four corners of the Complaint.

Rule 56 of the Federal Rules of Civil Procedure provides that Summary Judgment may not be granted unless, drawing all reasonable inference in favor of the non-moving party, no genuine issues of material fact remain to be tried such that the moving party is entitled to judgment as a matter of law. See *Lang v. New York Life Insurance Co.*, 721 F.2d 118, 119 (3d Cir. 1983).

The essential facts viewed in a light most favorable to the plaintiff are as follows: In August of 1976, plaintiff contracted with Rimback, "a local mover" to move, store and ultimately to deliver his household goods and personal belongings from New Jersey to New York. The carrier was to be United Van Lines.

Since plaintiff's house at Lake George was not completed, his belongings were stored at Rimback's Storage Warehouse from September 1, 1976 until June of 1979 when they were delivered to plaintiff's new home.

Plaintiff alleges that defendant admits that his belongings were stored for the first eight months from September 1, 1976 until April of 1977, in a leaky moving van outdoors instead of in concrete, fireproof storage rooms. He alleges that his belongings were subject to serious water damage and that they were damaged further by mildew when they were placed in the concrete storage

rooms after the eight-month period for the remaining two years without being permitted to dry thoroughly and without notifying plaintiff of the water damage when it was discovered after having been removed from the leaky trailer.

Plaintiff claims that he first learned of the water damage and subsequent mildew damage two years later when what was left of his belongings was delivered to his newly completed Lake George home.

Soon after he learned of the damage he commenced the suit in Superior Court of New Jersey, Law Division, Essex County against Rimback, United and Allstate Insurance Company. The suit was voluntarily dismissed when plaintiff had no experts to testify regarding the damage which had occurred. However, plaintiff received in excess of $30,000 in a settlement with Rimback's insurer, Allstate. Thirty thousand dollars was the declared value of the goods released by the plaintiff to Defendant Rimback which appeared on the Order for Services. See Exhibits D and E to defendant's Brief.

In support of its Motion, Defendant Rimback in the two Briefs submitted on its behalf, relies heavily on Chief Judge Fisher's January 12, 1983 Opinion regarding the alleged liability of United. In short, defendant argues that under the Carmack Amendment to the Interstate Commerce Act, the citation of which I've already furnished, defendant's liability is limited to the value of the goods as declared by the shipper, in this case by plaintiff, on the bill of lading upon release of the goods to the carrier.

Since plaintiff has already received an amount in excess of defendant's maximum liability from defendant's insurer, he may not recover anything further from Rimback.

Appendix E

In opposing the Motion plaintiff argues that the Carmack Amendment limits liability to declared value only in cases of "fortuitous" loss and that it does not pre-empt a State law cause of action in tort or in contract arising out of negligent or intentional acts on the part of the carrier. However, plaintiff cites this Court to no authority for the proposition that the Carmack Amendment's provision for limitations on liability is limited to cases of "fortuitous" loss even if this Court agreed which such a reading of the statute, plaintiff submits no affidavits or other factual documents of the type cognizable under Rule 56(e) raising a genuine issue of fact regarding the nature and cause of the loss in this case which would tend to show that the loss here was not "fortuitous."

I am not persuaded by plaintiff's arguments. Before discussing the merits of today's Motion I turn briefly to the "law of the case" doctrine as it governs my determination.

It is the law of this Circuit that "judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule the decisions of each other." *TCF Film Corp. v. Gourley,* 240 F.2d 711, 713 (3d Cir. 1957); see *Hayman Cash Register v. Sarokin,* 669 F.2d 162, 168-69 (3d Cir. 1983).

This "rule of judicial comity," see *Gourley* at Page 714, applies with equal strength to subsequent reexamination of an issue already decided as it does to reexamination of an order in toto.

The Third Circuit has recognized four and possibly five exceptions to the doctrine's proscription: (1) the presence of "unusual circumstances", (2) a timely Motion for reconsideration, (3) a showing that new evidence exists which was not before the

prior judge when he rendered his decision, and (4) the development of some "supervening" law directly applicable to the issues in question. See *Hayman Cash Register,* 669 F.2d at 169-70.

The fifth exception, not explicitly adopted by the Third Circuit in the *Hayman Cash Register* case, permits reconsideration and reversal of an Order of the prior judge of co-ordinate jurisdiction where that Order is found to be "clearly erroneous." See Page 170 at Note 10 of the Hayman Opinion.

While adoption of this fifth exception was left an open question in Hayman, I find that the Supreme Court's recent approval of this exception in *Arizona v. California,* 103 Supreme Court 1382 at 1391, Note 8 was cited by that Court in 1983. I find that that Opinion tips the balance in favor of its adoption in this Circuit.

Since Motions for reconsideration have already been filed and denied and no unusual circumstances, new evidence or new law has been demonstrated by plaintiff, the question with regard to all issues decided by Chief Judge Fisher in his January 12 Opinion and applicable to the Motion before me is whether Chief Judge Fisher's decision was "clearly erroneous." I do not believe his decision was.

Chief Judge Fisher held that "(w)here a shipper has elected to release his goods at a declared value, his recovery will be limited to that amount."

This conclusion was based on the Carmack Amendment as it read at the time of the claim in this case arose. Section 20(11) of Title 49 of the United States Code, repealed and recodified without substantive change in 49 U.S.C. Sections 10103, 11707,

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10730, provided in pertinent part: "The value declared in writing by the shipper or agreed upon in writing as the released value of the property...shall have no other effect than to limit liability and recovery to an amount not exceeding the value so declared or released...."

As Chief Judge Fisher recognized, "(u)nder this Amendment a carrier may legitimately limit its liability for actual loss or damage to goods received for interstate shipment, but only when it does so in compliance with an Interstate Commerce Commission Order authorizing it 'to establish and maintain rates that are dependent upon the value declared in writing by the shipper or agreed upon in writing as the released value of the property.' See *Marohn v. Burnham Van Services, Inc.*, 478 F.Supp. 49, 50 (N.D. Ill. 1979) (and cases cited therein)."

Defendant Rimback is so authorized by the I.C.C. and plaintiff, "for the limited purposes of this Motion, (has) conceded that, had the loss or damage occurred 'fortuitously'...(he) would be limited in his recovery" pursuant to the Carmack Amendment. See Page 5 of his Brief.

Plaintiff also does not dispute that the amount to which he "would be limited" is $30,000—the figure which appears as the declared value on the bill of lading.

As noted above, plaintiff argues that he retains some sort of cause of action for non-fortuitous loss. However, Chief Judge Fisher held that "(c)onsidering the interpretation of the Carmack Amendment by the majority of Courts and the view of the Third Circuit in *Howe v. Allied Van Lines,* 622 F.2d 1147, 1157 (3d Cir.), *cert. denied,* 449 U.S. 992 (1980), I am persuaded that the better view is that the Carmack Amendment has completely

pre-empted suits in negligence by holders of bills of lading against their carriers."

See *Fulton v. Chicago, Rock Island & Pacific Railroad Co.*, 481 F.2d 326, 331 (8th Cir.), *cert. denied sub nom., Soo Line Railroad Co. v. Fulton,* 441 U.S. 1040, (1973); *W.D. Lawson & Co. v. Penn Central Co.*, 456 F.2d 419, 423 (6th Cir. 1972) and other cases cited in Chief Judge Fisher's Opinion at Pages 4 and 5; but see *Litvak Meat Co. v. Baker,* 446 F.2d 329 (10th Cir. 1971).

I do not find this holding to be clearly erroneous.

Chief Judge Fisher also held that a "material deviation" from the terms of a carriage contract does not take the contract out of the Carmack Amendment's permissible limitation on liability. To the extent that the plaintiff attempts to reargue this point with respect to the liability of Rimback, I am bound by Chief Judge Fisher's holding in that I do not find it to be clearly erroneous and plaintiff has provided me with no other reason to reconsider the law of the case regarding this issue.

Similarly, with regard to plaintiff's allegations of fraud and his claim for punitive damages, as they relate to Rimback's liability, as Chief Judge Fisher noted in rejecting this argument, "the Court has not found one case where punitive damages were awarded when the plaintiff elected to release his goods at a declared value."

I find Chief Judge Fisher's analysis of plaintiff's allegations of fraud to be persuasive and dispositive of these arguments in the Motion before me. Plaintiff has referred his court to no reason, fact or case supporting a different analysis with regard to Defendant Rimback.

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Having concluded that plaintiff's recovery is limited by his own declaration of the value of his goods, I have decided to grant Summary Judgment in favor of Defendant Rimback. It is undisputed that plaintiff has received an amount in excess of the declared value and I see no compelling reason to permit plaintiff to circumvent the strictures of the Carmack Amendment or to obtain double recovery for his total allowable loss under law.

Defendant's Motion is granted.

Mr. Foley, would you be kind enough to draw an appropriate Order in conformance with my determination here today?

MR. FOLEY: Yes, your Honor.

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HONORABLE HAROLD A. ACKERMAN

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF NEW JERSEY

DOCKET NO. 81-3411 LAW

CIVIL ACTION

WILBUR E. DOW, JR.,

Plaintiff,

v.

UNITED VAN LINES and RIMBACK
STORAGE COMPANY,

Defendants.

ORDER

THIS MATTER having come before the Court on the motion of defendant, Rimback Storage Company, by its attorneys, Foley, Shelly & Niemann (Thomas F. X. Foley, Esq. appearing), for summary judgment against plaintiff, Wilbur E. Dow, Jr., pursuant to Rule 56 of the Federal Rules of Civil Procedure; and

This motion being further supported by the memorandum of defendant, Rimback Storage Company, Joel I. Bergman, Esq., appearing, and plaintiff, Wilbur E. Dow, Jr., by his attorney, Arthur P. Condon, Esq., having filed a responding memorandum to both pleadings of defendant; and

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The Court, having considered the pleadings filed and the argument of the attorneys for the respective parties, and being of the opinion that the pleadings on file in this action, together with the affidavits submitted in support of and in opposition to the motions of the defendant and plaintiff show palpably that there is no genuine issue as to any material fact challenged, and that defendant, Rimback Storage Company, has a right to such a judgment as a matter of law;

IT IS on this ____ day of _____, 1984, ordered that judgment be, and it is hereby entered in favor of defendant, Rimback Storage Company, and against plaintiff, Wilbur E. Dow, Jr., dismissing the Complaint, with prejudice and without costs.

HAROLD A. ACKERMAN,
U.S.D.C.J.

ORIGINAL FILED
APR 23, 1984